Supreme Court, U. S.
FILED
AUG 14 1980
MICHAEL RODAK, JR., CLERK

No. 80-182

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANTHONY J. CELEBREZZE, JR.,
IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF OHIO, *Petitioner,*

v.

JOHN B. ANDERSON, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE STATE OF MARYLAND AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STEPHEN H. SACHS,
Attorney General of Maryland.
GEORGE A. NILSON,
Deputy Attorney General,
DIANA G. MOTZ,
Assistant Attorney General,
ROBERT A. ZARNOCH,
Assistant Attorney General,
Counsel of Record
1400 One South Calvert Bldg.,
Baltimore, Maryland 21202,
(301) 383-3737,
Attorneys for the
State of Maryland.

The Daily Record Co., Baltimore, MD 21202

The State of Maryland, as amicus curiae, respectfully urges that a writ of certiorari issue to review the judgment of the United States District Court for the Southern District of Ohio, Eastern Division, which was entered in the above captioned case on July 18, 1980 and which has been appealed to the Court of Appeals for the Sixth Circuit.

QUESTIONS PRESENTED

1. Whether the ballot access decisions of this Court require that the constitutionality of a state's filing deadline for independent presidential candidates be gauged in light of the past experience of reasonably diligent independent candidates and the political realities of presidential campaigns, and only after a factual determination of the alleged severity of the deadline.

2. Whether Ohio's March filing deadline for independent presidential candidates, which actual experience has shown not to deter reasonably diligent independent candidates from obtaining a place on the state's general election ballot, can be constitutionally justified as preserving political stability by denying ballot access by defeated and disaffected party candidates.

TABLE OF CONTENTS

	PAGE
INTERESTS OF AMICUS CURIAE	1
REASONS FOR GRANTING THE WRIT:	
Review is necessary to prevent lower federal courts from misapplying this Court's decisions on the constitutionality of ballot access restrictions and candidate filing deadlines and from unnecessarily affecting the vote in five states and possibly altering the result of the 1980 presidential election	4
CONCLUSION	8

TABLE OF AUTHORITIES

Cases

Anderson v. Celebrezze, No. C-2-80-400 (S.D. Ohio July 18, 1980), *appeal* docketed, No. ____ (6th Cir. July 30, 1980)	*passim*
Anderson v. Morris, Civil Action No. Y-80-1632 (D. Md. Aug. 6, 1980), *appeal noted* Aug. 8, 1980	3, 5, 6, 7
Auerback v. Mandel, 409 U.S. 808 (1972)	5
Bradley v. Mandel, 449 F. Supp. 983 (D. Md. 1978)	2
Buckley v. Valeo, 424 U.S. 1 (1976)	6
Bullock v. Carter, 405 U.S. 134 (1972)	6
Mandel v. Bradley, 432 U.S. 173 (1977)	*passim*
Pratt v. Begley, 409 U.S. 943 (1972)	5
Storer v. Brown, 415 U.S. 724 (1974)	*passim*
Sweetenham v. Gilligan, 409 U.S. 942 (1972)	5

PAGE

Jenness v. Fortson, 403 U.S. 431 (1970) 5

Tucker v. Salera, 424 U.S. 959 (1976) 5

Williams v. Rhodes, 393 U.S. 23 (1968) 4, 5

Williams v. Tucker, 382 F. Supp. 381 (M.D. Pa. 1974) 7

Statutes

1979 Md. Laws, Chap. 108 3

United States Constitution:

Amendment I ..... *passim*

Amendment XIV, Section 1 ..... *passim*

Miscellaneous

Developments in the Law — Elections, 88 Harv. L. Rev. 1111 (1975) 6

Polsby and Wildavsky, Presidential Elections (5th Ed. 1980) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-182

ANTHONY J. CELEBREZZE, JR.,
IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF OHIO,
Petitioner,

v.

JOHN B. ANDERSON, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE STATE OF MARYLAND AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTERESTS OF AMICUS CURIAE

The interests of the amicus curiae and its reasons for urging this court to review the decision in *Anthony J.*

Celebrezze, Jr. v. John B. Anderson, et al., ___ F. Supp. ___, No. C-2-80-400 (S.D. Ohio, July 18, 1980), *appeal docketed*, No. ___, U.S. Court of Appeals for the Sixth Circuit, July 30, 1980, are as follows:

Amicus is a sovereign state, which like Petitioner and three other states, has an independent candidate filing deadline challenged by Respondent John B. Anderson as unconstitutionally infringing on his rights of political association and the rights of others to cast their vote for him. Just three years ago, the constitutionality of Maryland's filing deadline, which at that time required statewide candidates to file more than 50,000 valid signatures by early March in presidential election years and by early July in gubernatorial election years, was at issue before this Court. *Mandel v. Bradley*, 432 U.S. 173 (1977). In that case, this Court held that a three-judge district court had erred in making the "assumption that the filing deadline by itself was *per se* illegal," *Id.* at 178, and ordered the case remanded for application of the principles of *Storer v. Brown*, 415 U.S. 724 (1974). Specifically, the lower court was told to examine what the past experience of independent candidates in Maryland indicated about the burdens of the filing deadline, whether other features of Maryland election law moderated whatever burden that existed, and what difficulties an independent candidate experienced in gathering signatures by the deadline. 432 U.S. at 177-78. On remand, the district court made the factual findings required by this Court and concluded that to require an independent candidate for statewide office to gather more than 50,000 valid signatures by an early March filing deadline unconstitutionally burdened Bradley's rights. *Bradley v. Mandel*, 449 F. Supp. 983 (D. Md. 1978). Responding to these decisions and adopting an approach suggested by the district court, the General Assembly of Maryland moderated the burden of the filing deadline and attuned the law to the situation

of the reasonably diligent candidate that Bradley was found to be, by enacting a two-stage filing deadline. Chapter 108 of the Laws of 1979. A certificate of candidacy and one-third of the necessary signatures (or approximately 18,500) were required of an independent candidate for statewide office by the March deadline — the remaining signatures were due in August. *Id.*

It did not take long for experience to validate the constitutionality of Maryland's new filing deadline statute. Where previously no independent candidate for statewide office in Maryland had been able to qualify by a March deadline without judicial intervention, the first and only independent candidate for statewide office to try to qualify (Libertarian Party presidential candidate Edward Clark) filed sufficient signatures by the March filing deadline. *See Defendants' Memorandum of Law in Support of Motion for Summary Judgment* at 21-22, *Anderson v. Morris,* ___ F. Supp. ___, Civil Action No. Y-80-1632 (D. Md. Aug. 6, 1980), *appeal noted* Aug. 8, 1980.[1] Nevertheless, Maryland fared no better than Ohio in attempting to focus the reviewing court's attention on the relevant experience of independent candidates in the state or in convincing the court to make a factual analysis of the burdens allegedly imposed by the deadline. *Anderson v. Morris, supra.*

Maryland is vitally affected by what happens in this Court in *Celebrezze v. Anderson.* Ohio, like Maryland, has a March deadline. The past experience of qualifying independent candidates in both states was ignored, along with the principles of *Storer* and *Bradley.* Finally, the district court in Maryland relied extensively on the Ohio opinion. But more importantly, without prompt considera-

[1] Past experience also showed that no independent candidate for statewide office who attempted to comply with the statute (even Bradley) had any difficulty filing a certificate of candidacy by the March date.

tion by this court of Ohio's petition for certiorari, Maryland may be denied an authoritative and timely determination with respect to the constitutionality of its candidate filing deadline. If John Anderson is not constitutionally entitled to a place on the general election ballots in Ohio, Maryland and the other states where deadlines have been challenged, the states, their voters and the candidates should know that before the general election.

REASONS FOR GRANTING THE WRIT

REVIEW IS NECESSARY TO PREVENT LOWER FEDERAL COURTS FROM MISAPPLYING THIS COURT'S DECISIONS ON THE CONSTITUTIONALITY OF BALLOT ACCESS RESTRICTIONS AND CANDIDATE FILING DEADLINES AND FROM UNNECESSARILY AFFECTING THE VOTE IN FIVE STATES AND POSSIBLY ALTERING THE RESULT OF THE 1980 PRESIDENTIAL ELECTION.

In *Mandel v. Bradley,* 432 U.S. 173 (1977), this Court criticized a lower court's assumption that a March filing deadline for independent candidates was facially unconstitutional. The lower court in *Bradley,* without any factual analysis, had determined that the deadline served no compelling interest. This Court rejected such an approach, mandating lower courts to engage in the heavily factual, heavily pragmatic analysis of the burdens such a deadline would impose on the "reasonably diligent independent candidate." *Id.* at 177-78. On the basis of filing deadline decisions involving Respondent Anderson in Ohio, Maryland, New Mexico and Maine, it would appear that lower courts have learned nothing from the *Bradley* decision.

Instead these courts in facially invalidating filing deadlines have ignored not only the holding of *Bradley* but a decade of this Court's filing deadline decisions which inevitably led to the result reached by this Court in *Bradley. See Williams v. Rhodes,* 393 U.S. 23 (1968) (filing deadline of 9 months before general election struck down but only in conjunction with other restrictive ballot access

provisions); *Jenness v. Fortson,* 403 U.S. 431 (1970) (69-day pre-primary filing deadline occurring 5 months before general election upheld); *Auerbach v. Mandel,* 409 U.S. 808 (1972) (summary affirmance of decision upholding filing deadline occurring 8 months before general election); *Sweetenham v. Gilligan,* 409 U.S. 942 (1972) (summary affirmance of decision upholding same filing deadline at issue in *Williams*); *Pratt v. Begley,* 409 U.S. 943 (1972) (summary affirmance of decision upholding filing deadline of 7 months before general election); *Tucker v. Salera,* 424 U.S. 959 (1976) (summary affirmance of decision invalidating filing deadline of 8 months before the general election but only because it was coupled with a 21-day signature gathering period).

Moreover, the reasons the lower courts have offered for refusing to engage in the *Storer-Bradley* analysis are singularly unpersuasive. The lower court in *Celebrezze* erroneously held that *Bradley* was not a filing deadline case and stated that in any event the reasonably diligent candidate inquiry could never aid it in gauging the constitutionality of a filing deadline standing by itself.[2] Thus, the court's only inquiry was whether the deadline served a compelling interest. The lower court judge in the Maryland case turned the *Storer-Bradley* inquiry completely on its head by stating that he would not apply the test until he concluded that the state had a compelling interest. *See Anderson v. Morris, supra,* (Slip Opinion at 6) ("Only after the court is satisfied that such a compelling state interest exists will it reach the issue of how drastic the restrictions are — that is, could a reasonably diligent candidate comply?"). However, the *Storer-Bradley* analysis must be the trial court's first step. The factual analysis is necessary to determine "how well state interests are

[2] The *Celebrezze* court also misread *Storer* and *Bradley* only to require an examination of whether the plaintiff-candidate was reasonably diligent.

served and how great is the infringement on constitutionally protected interests. . . ." Developments in the Law — Election Law, 88 Harv. L. Rev. 1111, 1142-43 (1975). If the burdens are found not to be substantial or excessive, the provision should not be invalidated. *Buckley v. Valeo,* 424 U.S. 1, 101 (1976); *Bullock v. Carter,* 405 U.S. 134, 143 (1972).

If the courts in Ohio, Maryland and New Mexico and Maine had applied *Storer* and *Bradley* and looked at the experience of independent candidates or the realities of presidential campaigns, what would they have found? These courts would have learned that there was little substance to Respondent Anderson's claim that he was forced to make up his mind too early. Of the 11 candidates running for the major party presidential nominations (including Anderson), all announced many months before March 1980 — anywhere from 26 months to 11 months before the general election. *Defendants' Memorandum of Law in Support of Motion for Summary Judgment* at 21, *Anderson v. Morris, supra.*[3] Early campaigning was also a characteristic of true independent candidates for president in 1980 as well as other past serious independent presidential candidates such as George Wallace and Eugene McCarthy. *Id.* Lower courts in Ohio, Maryland and New Mexico and Maine paid no attention to these facts because of their shaky assumption that some party candidate could decide to run for president at the summer conventions.[4] These courts also did not want to hear about the

[3] Thus, the necessary predicate for Respondent's equal protection claim — a benefited class of party candidates and a burdened class of independents — was clearly absent.

[4] With 37 presidential primaries in 1980 and the availability of federal financing for campaigns, the chances of a party nominating someone other than the victor in the primaries has become exceedingly remote. *See* Nelson W. Polsby and Aaron Wildavsky *Presidential Elections* (5th Ed. 1980) at 148. In fact, not since 1952 has a major party convention gone beyond the first ballot in choosing a candidate.

independent candidates who were able to meet a March filing deadline. For example, in Ohio five independent presidential candidates were accorded access to the general election ballot in 1976; in 1980 another five timely filed nominating petitions by the March deadline. Such evidence demonstrates Ohio's filing deadline is no substantial burden for the true independent. It does not force him to make up his mind too early. It disadvantages only one kind of candidate, a defeated and disaffected party candidate.

Courts in Ohio and Maryland have concluded that a state's asserted compelling interest in maintaining political stability by keeping defeated and disaffected party presidential candidates from running as independents was served by an early filing deadline only by "mere happenstance." *Anderson v. Celebrezze, supra* at 21; *Anderson v. Morris, supra* at 11. Not only are these lower courts wrong on whether a ballot access provision such as a filing deadline can serve the interests of a "sore loser" statute, *see Storer v. Brown, supra* at 743; *Williams v. Tucker,* 382 F. Supp 381 (M.D. Pa. 1974), but by ignoring *Storer v. Brown* and the relevant facts, they refused to recognize how well the March deadline serves that interest without unnecessarily burdening the rights of true independents.

Finally, it is important to note that the refusal of these lower courts to come to grips with the principles of this Court's ballot access cases will undoubtedly have far-reaching consequences. The vote in Ohio, Maryland, New Mexico, Kentucky and Maine will obviously be affected. With a close presidential race and the possibility that the next president may be chosen by the House of Representatives, the vote in these states may loom as a large factor. In short, the *Celebrezze* case raises issues of immediate national importance.

CONCLUSION

For all of these reasons, the State of Maryland urges that this Court's determination of the urgent questions raised by Ohio is worthy of the most serious consideration. Thus, this Court should grant Ohio's petition for certiorari and advance the case for prompt argument and decision before the 1980 general election.

Respectfully submitted,

STEPHEN H. SACHS,
Attorney General of Maryland.
GEORGE A. NILSON,
Deputy Attorney General,
DIANA G. MOTZ,
Assistant Attorney General,
ROBERT A. ZARNOCH,
Assistant Attorney General,
Counsel of Record
1400 One South Calvert Bldg.,
Baltimore, Maryland 21202,
(301) 383-3737,
Attorneys for the
State of Maryland.